IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 207

SCHEXLEY INDUSTRIES, INC.,

Petitioner,

vs.

DAN LIND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on the 6th day of April, 1960, and the Order of the District Court of the United States for the District of New Jersey entered on June 10, 1960.

Opinions Below.

The opinion of the District Court for the District of New Jersey is reported at 167 F. Supp. 590 and at page 17b of the Appendix in the Circuit Court of Appeals.

The opinion of the Court of Appeals for the Third Circuit is found in the Appendix at pp. A-1—A-20.

Jurisdiction.

On July 11, 1958, the District Court for the District of New Jersey entered judgment in favor of Plaintiff, Dan Lind (Appendix, Circuit Court of Appeals, 14-b). On December 2, 1958, the Court ordered the judgment set aside, entered judgment for defendant n.o.v. and granted it a new trial if reversed on appeal (Appendix, Circuit Court of Appeals, 31-b). By its judgment, entered on the 6th day of April, 1960, the Circuit Court of Appeals for the Third Circuit reversed the District Court action (Appendix A-22). Thereafter, its mandate issued and on June 10, 1960, the District Court entered an order reinstating the original judgment (Appendix A-30) which by stipulation of counsel remains unpaid pending the determination of this matter.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented.

The United States Court of Appeals for the Third Circuit reviewed an appeal from a judgment entered in the United States District Court for the District of New Jersey. At the trial a motion for dismissal at the close of the plaintiff's case was made, which was denied. A motion for a directed verdict at the close of all of the evidence was made under Rule 50. The trial judge denied the motion, submitted the case to the jury and in doing so specifically provided that the defendant was to have leave to avail itself of all the rights accorded it by Rule 50. The jury returned a verdict for the plaintiff.

Thereafter the defendant duly moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. This motion was considered by the trial judge after the submission of extensive briefs by attorneys for the respective parties. The trial judge rendered a written opinion which is set out in full at 167 F. Supp. 590 as a result

of which an order was entered directing that the verdict in favor of the plaintiff be set aside and that judgment be entered for the defendant notwithstanding the verdict for the plaintiff and in the alternative also ordered that in the event of the reversal of the defendant's judgment on appeal a new trial be granted on the grounds that the verdict was against the weight of the evidence and resulted from an error in the admission of evidence.

The Court of Appeals reversed the trial court's action in entering judgment for the defendant notwithstanding the verdict for the plaintiff, and also reversed the trial court's alternative order in granting a new trial to the defendant in the event of a reversal of the defendant's judgment on appeal.

The questions presented are:

I. Whether the Circuit Court of Appeals had jurisdiction to review an interlocutory order granting a new trial, and to reverse it in contravention of decisions of this Court and of previous decisions of its own and other Circuit Courts of Appeal?

II. Whether the decision below contravenes the principles heretofore established by decisions of other Circuit Courts of Appeal and of the Courts of the State of New York with respect to the law of inherent, implied or apparent authority where a contract of an unusual nature is involved?

Statutes, Federal Rules, and Regulations Involved.

The pertinent portion of U. S. Code, Title 28, §§1291 and 1292 are set forth in the petition at page 14, and the pertinent portions of Rules 50, 52, 59 and 73 of the Federal Rules of Civil Procedure and the Advisory Committee's Report of proposed amendments to Rules of Civil Procedure for the District Courts of the United States are set forth in the Appendix at pp. A-22 to A-28.

Statement.

The statement outlined in the trial court's opinion is, in the judgment of the petitioner, a very concise summary of the essential facts. The statement follows (pp. 18b, L34 to 22b, L29 of the Appendix in the Circuit Court of Appeals):

> "Briefly, Lind's proofs were as follows: He commenced employment with defendant as a salesman in the year 1941. From 1942 to 1950, he worked on a commission basis. On August 31, 1950 he became an assistant sales manager for the New York metropolitan area on a salary basis of $125 per week, raised to $150 on October 1, 1950, plus certain allowances. On April 19, 1951 Lind was appointed District Manager for the metropolitan area and was assigned approximately one-third of all of the defendant's salesmen in the area. This arrangement had its inception with the issue by Metropolitan Sales Manager Kaufman to each of his three assistants of an interoffice memorandum. This memo advised of the new title and briefly set forth the duties and responsibilities of the new position. The pertinent portion of the memo relied on by Lind was as follows:
>
> " 'An incentive plan is being worked out so that you will not only be responsible for increased sales in your district, but will benefit substantially in a monetary way.
>
> " 'Very truly yours,
>
> s/ H. B. Kaufman
> Metropolitan Sales Manager.'
>
> "The other two District Managers under Kaufman received similar memoranda. Lind accepted the title and responsibilities of District Manager, but continued to receive only his salary remuneration of

$150 per week until it was increased to $175 in January, 1952. On February 1, 1952 he was transferred from this position to become State Manager of Defendant's business in New Jersey.

"Lind admits that no contract arose between him and the defendant upon the language of the inter-office memorandum of April 19. He does claim, however, that shortly thereafter in a discussion with Kaufman about the incentive plan adverted to in the memorandum, the latter informed him that 'They are working something out for you' (68b 1-8). Kaufman reiterated this some two weeks later. Finally, Lind testified, in June 1951 Kaufman told him that he was to receive a 1% 'override' commission on the gross sales of all the salesmen working under him. Kaufman later reassured Lind, upon his further inquiry, that he should not worry but would receive his 'override'. Lind's testimony was corroborated as to at least one of these meetings with Kaufman. In June 1951 a secretary in Kaufman's office heard Kaufman tell Lind that he would receive the 'override'. Until Lind became New Jersey State Manager he claims to have made several inquiries of Kaufman (denied by Kaufman) (162 line 26) (170b line 3-171b) respecting the commission, but was unable to secure any more definite response than the suggestion that he refrain from worrying and the assurance that he would receive the commission. Lind argues that Kaufman was held out by the defendant corporation as apparently clothed with authority to bind the corporation to the payment of the 'override' commission. He bases this on the fact that Kaufman advised him as to his weekly salary and all salary increases after he became Kaufman's assistant, and of his appointment as District Manager. Lind further testified that in 1950 one Herrfeldt, a vice-president of the defendant, had

asked Lind to become Kaufman's assistant. Lind agreed and Herrfeldt told him that Kaufman would fix his salary on that capacity. Herrfeldt was, at the time in charge of all sales for the corporation, and plaintiff says that in such capacity Herrfeldt was authorized to hire and fire and to fix salaries of all personnel under his jurisdiction. After this conversation with Herrfeldt Kaufman did in fact notify Lind of his salary status and of the October 1, 1950 increase. Lind admits that Kaufman did not inform him who had determined that he should receive the 'override' commission (70b line 37—line 4-71b). While working as District Manager, Lind made no further inquiry of Herrfeldt as to the commission. However, after his transfer from Kaufman's area, in the Fall of 1952, he was advised by Herrfeldt, in response to his further inquiry, not to worry, and was assured that he would ultimately receive the commission.

"With regard to Kaufman's meaning when he stated 'They are working it (the commission) out', Lind conceded he understood 'they' to refer to Kaufman's superiors, including the company's president, Arthur Schulte, and his brother, John, a vice-president. Arthur Schulte's successor as president of the company on February 1, 1955, Stanley Brown, was never asked by Lind for payment of any commission. However, he did advise Lind, according to Lind's testimony, in the course of discussions of a possible sale of the New Jersey distribution business of the corporation to Lind, that if such sale were effected no charge would be made for goodwill because of the large amount of commissions owed to him. Brown denied this (260b-11-20).

"Defendant's evidence was as follows: It is uncontroverted that when Lind was assigned the title of District Manager by the memorandum of April 19, he did not receive any salary increase. No

reference was made to any commission rights in any of the succeeding payroll increase authorizations. There is no evidence to contradict the testimony of Arthur Schulte that all payroll increases had to be approved by him before being made. Arthur Schulte, president of the defendant corporation from 1950 to 1954, testified that Herrfeldt had no authority to employ personnel or fix salaries or compensation of any kind independently of the approval or rejection by Schulte of such action, and that Kaufman was likewise so limited.

"Plaintiff lays great stress upon the language of the memo of April 19 to the effect that an incentive plan was in process of being worked out from which the plaintiff would benefit substantially in a monetary way. However, on January 28, 1952, Lind's annual salary was increased $1,300. It was noted on this payroll authorization approved by Schulte, that this increase was for merit. For aught that may appear in the evidence to the contrary, plaintiff accepted this increase without comment respecting his failure to receive the claimed 1% commission. The acceptance of this salary increase, of course, was just six months after Lind, by his own testimony, had been told by Kaufman that he was to receive the commission.

"The defendant also had certain fringe benefits in effect during Lind's employment as District Manager. An 'Extended Plan for Incentive Compensation' adopted by the stockholders in April 1949 provided for certain incentive compensation based on the consolidated net profit of the company for the preceding calendar years. Also a pension trust had been in effect since April 1947. In addition to these so-called fringe benefits defendant's New York Metropolitan Sales Manager encouraged sales competition among his subordinates for which he would recommend that cash prizes be awarded.

"Kaufman testified that he issued the interoffice memorandum of April 19 to each of his three assist-

ants. Although he denied having any conversations with Lind relative to his compensation following April 19, 1951, Kaufman conceded that he planned to recommend to Eastern Sales Manager Reiner, for submission to Herrfeldt, that Kaufman's three assistants be included in 'our incentive pension plan—bonus plan.' Kaufman's recommendations were approved, and these were accordingly included 'in the company incentive plan.' He explained that the reference in the memo of April 19th to an incentive plan and to the substantial monetary benefit was the incentive bonus plan which he had in mind, and that 'if an assistant did an especially good job, I (Kaufman) would recommend, through Mr. Reiner and Mr. Herrfeldt, that he would get an extra bonus or a larger bonus than maybe the other two men.'"

As outlined above, after the jury rendered a verdict for the plaintiff the trial judge entered an order directing that a verdict in favor of the plaintiff be set aside and judgment be entered for the defendant notwithstanding the verdict for the plaintiff, and in the alternative also ordered that the defendant be entitled to a new trial in the event of the reversal of the defendant's judgment on appeal.

JURISDICTION OF FEDERAL DISTRICT COURT

Diversity.

REASONS FOR GRANTING WRIT

I. The interpretation of Rule 50(b) is contrary to decisions of this Court and other Circuit Courts of Appeal.

The decision of the Court of Appeals for the Third Circuit is in direct conflict with the interpretation of Rule 50(b) by this Court in *Montgomery Ward and Co.* v. *Duncan* (1940) 311 U. S. 243, 61 S. Ct. 189, 85 L. Ed. 147 and of the decision of the Court of Appeals for the Second Circuit

in ...der v. *Commercial Travelers Mutual Acc. Assn. of Am...ca*, 165 F. 2d 896 (1948) (2d Cir.). In the interpretation of Rule 50(b) of the Federal Rules of Civil Procedure, the decision below impinges upon the function and discretion of a trial judge in a manner not intended by this Court in the issuance of the Federal Rules of Civil Procedure. Review of the action of the Court of Appeals in reversing the alternate order of the trial judge granting a new trial pursuant to Rule 50(b) therefore presents an issue of great public importance affecting trial procedures in the District Courts of the United States.

This Court has enunciated the non-reviewable character of the alternative order under Rule 50(b) granting a new trial in the case of *Montgomery Ward & Co.* v. *Duncan*, *supra*. This Court there said, 311 U. S. at page 254, 61 S. Ct. at page 196:

> "Should the trial judge enter judgment n.o.v. and in the alternative, grant a new trial on any of the grounds assigned therefor, his disposition of the motion for a new trial would not ordinarily be reviewable, and only his action in entering judgment would be ground of appeal. If the judgment were reversed, the case, on remand, would be governed by the trial judge's award of a new trial."

The statement of this Court in the *Montgomery Ward* case, that the awarding of a new trial in the alternative after entering a judgment n.o.v. would not ordinarily be reviewable and only the judges' action in entering judgment would be ground of appeal, naturally leads to an investigation of what the Court meant by the language, "would not ordinarily be reviewable". A reading of the cases cited in the footnote keyed to this phrase by this Court shows that such review is limited to instances where the judgment which the trial court ordered be set aside so that a new trial

could be held had already become final and the action of the lower court was attempted at a time after it had lost its power over the proceeding.*

The role of the trial judge and the weight to be accorded to his decision "that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice" has been stressed by this Court in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212, 216, 91 L. Ed. 849, 852 (1947) in which it is described as calling for a

> "judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart * * *. Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone."

This issue is further highlighted by the remarks of Circuit Judge Hastie in his dissent in the case at bar printed in the Appendix at pp. A-19—A-20:

> "The present record discloses a sharp conflict of testimony whether Kaufman, the metropolitan sales manager, ever promised plaintiff, his subordinate district manager, a 1% commission on all gross sales of agents working under plaintiff. There are several remarkable aspects of this alleged promise which could reasonably have influenced the trial judge on this decisive issue. This commission

* Cases cited by the Court in the *Montgomery Ward* case are as follows: *United States* v. *Young*, 94 U. S. 258, 24 L. Ed. 153; *Young* v. *United States*, 95 U. S. 641, 24 L. Ed. 467; *Phillips* v. *Negley*, 117 U. S. 665, 671, 6 S. Ct. 901, 903, 29 L. Ed. 1013; *Hume* v. *Bowie*, 148 U. S. 245, 13 S. Ct. 582, 37 L. Ed. 438; *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 53 S. Ct. 252.

would have more than quadrupled plaintiff's salary of $150 per week, making him much higher paid than his immediate superior, Kaufman, or any other company executive, except the president. No other sales manager or supervisor received any such commission at all. Moreover, after the alleged promise was made, month after month elapsed with no payment on the 1% commission or indication of any step to fulfill such an obligation. Yet plaintiff himself admits that he made no formal demand for or inquiry about the large obligation for several years, and said nothing even informally about it to anyone for many months save for an occasional passing verbal inquiry said to have been addressed to Kaufman. The trial court may have reasoned that the amount said to have been promised was so abnormally large and plaintiff's concern about non-payment so unnaturally small as to make it incredible that the promise ever was made. In addition, the very vagueness of the alleged promise and the absence of any mention of time in it may have increased the incredulity of the judge who heard the evidence."

The Third Circuit recognized the principle laid down in the *Montgomery Ward* case in *Menneti* v. *Evans Construction Co.*, 259 F. 2d 367, (3rd Cir. 1958) when it stated, at page 371 of the opinion:

"The district court took the further action of granting in the alternative a new trial, concluding that the verdicts were against the weight of the evidence and that the verdict in the survival action was excessive. Following the decision of the Supreme Court in *Montgomery Ward & Co.* v. *Duncan*, 1940, 311 U. S. 243, 61 S. Ct. 189, 85 L. Ed. 147, our only recourse is to remand for a new trial."

The situation in *Binder* v. *Commercial Travelers Mutual Acc. Ass'n. of America, supra*, is one which exactly parallels

that in this case. The Court of Appeals for the Second Circuit had originally reversed the District Court action in granting the defendant's motion for judgment notwithstanding the verdict and had ordered judgment entered for plaintiff despite the trial court's alternate order granting a new trial under Rule 50(b). On a petition for rehearing, defendant requested the Court to amend the form of the mandate to be handed down and urged that the Court could not properly go so far as to direct entry of judgment for the plaintiff on the verdict, thus denying a new trial. The Court concluded that the precedents required it to accede to the defendant's request, alluded to the excerpt above quoted from the *Montgomery Ward* case, and strengthened the view there expressed by noting at page 902 of the opinion:

> "Recent developments fortify the general conclusion here stated. For the Advisory Committee, attempting to codify the results reached by some of the intermediate courts, recommended an amendment to Rule 50(b), F. R. C. P., 28 U. S. C. A. following section 723c, to make clear the power of the appellate court to act in this and other instances. Report, June, 1946, Rule 50(b), pages 61-63, with Committee Note, pages 64-66. But this was one of the three proposed amendments which the Court did not adopt. Order Dec. 27, 1946, 329 U. S. 843; cf. H. R. Doc. No. 473, 80th Cong., 1st Sess., page 105. • • •"
>
> "Hence we cannot interfere with the judge's discretionary power in ordering a new trial. The petition for rehearing is therefore granted, our previous opinion and the judgment thereon are modified to state that the order of the district court setting aside the verdict and directing a judgment for the defendant is reversed, while its order for a new trial is affirmed, and the case is remanded to the district court."

Counsel has been unable to uncover any case in any Circuit Court of Appeals or in the United States Supreme Court which actually overrules the trial court in the *granting* of a new trial except those cases cited in the footnote in the *Montgomery Ward* case *supra*. But, obviously, as in those cases, where a judgment has become final and a trial court attempts to order a new trial, such order is ineffective since a final judgment can be changed only by appeal. The true question involved on an appeal from such an order purporting to grant a new trial is not whether the judge properly or improperly exercised his discretion in granting a new trial, but whether the trial Court had any jurisdiction to act in the premises. All of the cases referred to in the opinion of the Court of Appeals in the case at bar, in which an appellate tribunal has reviewed the initial action of the trial court, deal with the trial court's *refusal* to grant a new trial. The reason for the action of the Appellate Court in this regard is, of course, apparent because the denial of a new trial is a final decision and therefore appealable under Section 1291. On the other hand, a decision to grant a new trial is purely interlocutory and, hence, not appealable under this section or Section 1292 because not of the class of interlocutory orders with which the Courts of Appeal are empowered to deal.

The Court of Appeals was without jurisdiction to hear and determine the appeal from that portion of the Order of Judge Wortendyke awarding defendant a new trial in the alternative, and lacked the power to reverse the alternative order of the trial judge. The Courts of Appeal generally have jurisdiction to hear appeals only from final decisions of the District Courts and from certain specified interlocutory orders which are clearly set forth in the statute, United States Code, Title 28.

"SEC. 1291. Final decisions of district courts

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929."

"SEC. 1292. Interlocutory decisions

"(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

"(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

"(4) Judgments in civil actions for patent infringement which are final except for accounting.

"(b) When a district judge in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion

and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. As amended Oct. 31, 1951, c. 655, §49, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, §12 (e), 72 Stat. 348; Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770."

The Court of Appeals for the Third Circuit has recognized that an order for a new trial is interlocutory and does not come within the jurisdiction of the Court in an opinion by Judge Buffington in *Florini* v. *Stegner, et al.*, 82 F. 2d 708 (1936, 3rd Cir.), at page 709:

> "Our appellate jurisdiction is restricted to reviewing final decisions and to reviewing interlocutory orders or decrees only as are specified in 28 U. S. C. A. §§225, 227. An order granting a new trial is not a final decision, since it does not finally determine the rights of the parties. The granting of the new trial obviously does not come within our jurisdiction.
>
> "The parties orally asked us to pass on the merits so as to avoid the necessity of a new trial. Being without jurisdiction of the appeal, we are unwilling to act on this oral request, and so restrict ourselves to dismissing it."

An even stronger statement of the Court of Appeals for the Third Circuit is found in the case of *Frank Mercantile Corporation, et al.* v. *Prudential Insurance Company of America*, 115 F. 2d 496 (Cir. Ct. of Ap., Third Circuit 1940).

In the *per curiam* decision in that case concurred in by Circuit Judges Biggs, Maris and Clark, it was stated at page 497:

> "The defendant has appealed from an order of the district court for the Eastern District of Pennsylvania, granting a new trial after a verdict in its favor in a civil action. The appeal is brought to this court under Section 128(a) of the Judicial Code, 28 U. S. C. A. §225(a), which confers upon this court 'jurisdiction to review by appeal final decisions in the district courts.' The plaintiffs move to dismiss the appeal for want of jurisdiction, urging that the order appealed from was not a final decision.
>
> "The motion must be granted. It is clear upon reason and authority that an order granting a new trial is not a final decision and is, therefore, not appealable under the Judicial Code (Dry Dock, E. B. & B. R. Co. *v.* Petkunas, 2 Cir. 261 F. 988), even though it is granted upon an erroneous view of the law or involves a clear abuse of discretion." • • •
>
> "It is true, as the defendant points out, that in James *v.* Evans, 3 Cir., 149 F. 136, and Cottingham *v.* Hershey, 3 Cir., 71 F. 2d 473, this court entertained appeals from orders granting new trials. While it appears that the question of jurisdiction was not raised, considered or decided in either of these cases, it was necessarily involved in both of them. Consequently to the extent that they may be deemed authority for the proposition that an order granting a new trial is appealable they must be considered as now overruled."

The decision of the Third Circuit in the case at bar is also contrary to the determinations of other Circuit Courts of Appeal holding that an order granting a new trial is interlocutory and not appealable. ***Aluminum Company of***

America v. *Loveday*, 273 F. 2d 499 (1959 Ct. of Appeals, Sixth Circuit); *Grimm* v. *California Spray Chemical Corporation* (1959 Ct. of Appeals, Ninth Circuit), 264 F. 2d 145; and *Harry* v. *Newell* (1956 Ct. of Appeals, Ninth Circuit) 237 F. 2d 229.

This distinction is recognized by the Rules of Civil Procedure for the District Courts of the United States adopted by the United States Supreme Court where Rule 73 prescribes the period within which an appeal shall be taken from a judgment of the District Court, and further provides as follows:

> "• • • The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: *granting or denying a motion for judgment under Rule 50(b);* or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or *denying* a motion for a *new trial* under Rule 59." (Italics ours.)

It is interesting to note that there are no provisions in the rule for the staying of the time for appeal until the granting of a motion for a new trial under Rule 59. The question which comes to mind is, "why not?". The obvious answer, "there is no appeal."

II. The decision below contravenes the principles heretofore established by decisions of other Circuit Courts of Appeal and of the Courts of the State of New York with respect to the law of inherent, implied or apparent authority where a contract of an unusual nature is involved.

Both the trial judge (Appendix, Circuit Court of Appeals, 22(b) and 23(b)) and the Court of Appeals (Appendix, p. A-5) agreed that the New York substantive Law of Contracts and Agency applied to the alleged contract since it was made and was to have been performed in New York.

This branch of the case at bar brings up for review by this Court a question of paramount importance affecting the activities of business organizations of all kinds.

If we are to accept the determination by the Third Circuit on how apparent or inherent authority is to be established, the effect on every corporate entity and every business organization in this Country would be devastating. It follows therefore that the question here involved is a matter of great public importance and this Court should review the action of the Third Circuit to the end that the serious error of which the Third Circuit was guilty, in holding that the plaintiff had legally established what constitutes inherent or apparent authority, may be corrected.

The basic issue presented is whether under established principles of the Law of Agency the claimed overriding commission arrangement said to have been made by a sales manager with an employee on a salary, which commission agreement increased the annual compensation of $7,800 to an amount of annual earnings in excess of $55,000, was a commitment which was within the scope of either the

inherent, implied or apparent authority of the sales manager or whether this transaction was one of an unusual and extraordinary nature for which the sales manager had no authority (however designated) to bind the corporate principal. As the dissenting opinion of the Third Circuit indicates (quoted at pages 10 and 11 of this petition) the claimed arrangement had "several remarkable aspects" among which were that the compensation was greater than that of any other executive, except the President; that no other sales manager or supervisor (including plaintiff's fellow employees having equivalent status in the Metropolitan New York Area) received any such commission; that there was a long and unexplained delay in demanding payment extending for a period of nearly six years; and that the alleged promise itself was vague and indefinite.

The Appellate Court in its opinion commented on the fact that the trial court and counsel for Schenley in his argument relied heavily on the case of *Gumpert* v. *Bon Ami Company*, 251 F. 2d 735 (U. S. C. A. Second Cir. 1958). We respectfully urge that there was ample justification for such reliance. When the material facts in the *Gumpert* case are compared to those in the present case, the inescapable conclusion is that the Third Circuit should have applied the fundamental principals of law set forth in the *Gumpert* case which would have resulted in an affirmance of the trial court's action in the *Lind* case in entering a judgment for the defendant n.o.v. The basic questions in both the *Gumpert* case and the case at bar are—what are the indicia that the Courts should apply in order to determine whether or not a corporate official is vested with either inherent authority or apparent authority?

It is difficult to tell from the opinion of the Circuit Court of Appeals precisely what type of authority it found the

sales manager (Kaufman) had. The trial judge was clear in his opinion that the claim was that Kaufman had "apparent authority" (Appendix 23(b)). The Court of Appeals in its opinion defines two general classes of authority—actual and apparent. As a sub-division of actual authority it lists sub-classes—"implied authority" and "inherent agency". At one point it states:

> "From the evidence it is clear that Park & Tilford can be held accountable for Kaufman's action on the principle of 'inherent authority'." (Opinion—Appendix, p. A-7)

Yet it follows this statement which can only mean that Kaufman had actual authority with a statement that the same evidence would sustain a finding of apparent authority and that even though New York law applied, it was not necessary to determine whether New York Courts would follow the doctrine of "inherent agency". Finally faced with evidence that Kaufman had no authority to fix salaries, it states:

> "However, this testimony even if fully accepted, would only prove lack of actual or implied authority in Kaufman but is irrelevant to the issue of apparent authority." (Opinion—Appendix, p. A-9)

Therefore, on an extremely important issue of commercial law, the Bar and the commercial world are given no clear guide for the relationship between the corporation and its employees and the corporation through its employees with third parties. This Court should decide this significant business question.

The *Gumpert* case points out the elements necessary to establish the existence of inherent authority in an agent. At page 738 of the opinion, the Court states:

"Inherent or incidental authority is a species of actual authority and means that the position or status of a particular agent normally carries with it certain powers to bind the principal. See Mechem, Outlines of Agency §43 (4th Ed. 1952). Rosenberg, at the time, was a director and member of the executive committee of defendant's board of directors. Neither of these positions normally carries with it the inherent power to hire corporate officers, for that authority is normally invested in the board or committee as a body. Gerard *v.* Empire Square Realty Co., 195 App. Div. 244, 187 N. Y. S. 306; Knapp *v.* Rochester Dog Protective Ass'n, 235 App. Div. 436, 257 N. Y. S. 356; Bayer *v.* Beran, Sup., 49 N. Y. S. 2d 2, 11. The lack of such inherent power is emphasized in this case where Rosenberg is alleged to have offered Gumpert a most unusual employment contract whereby Gumpert was to receive stock of defendant as part of his compensation. Even if Rosenberg was chief executive officer of defendant, it is doubtful that he would possess power to make such an arrangement as a normal incident of his position. Cf. Noyes *v.* Irving Trust Co., 250 App. Div. 274, 294 N. Y. S. 2, affirmed 275 N. Y. 520, 11 N. E. 2d 323."

If inherent authority is a species of actual authority, what do we find in the evidence or referred to in the Court's opinion which could conceivably aid in establishing the existence of inherent authority in Kaufman? Nothing beyond the fact that Kaufman was Metropolitan Sales Manager and had been instructed by his superiors to transmit a message to Lind that the management of the Corporation had recently approved an increase in Lind's salary. On the basis of the ruling in the *Gumpert* case, does this establish inherent authority in Kaufman to raise Lind's compensation above that of his own and Reiner's and Herrfeldt's, Lind's three immediate superiors?

The trial court there also determined that the agent involved lacked apparent authority, and the following comparison should demonstrate that, tested by the same standards, the agent in the present case, Kaufman, had no such authority. In the *Gumpert* case the superior involved was a director and member of the Executive Committee; in the present case the superior, Kaufman, was New York Metropolitan Sales Manager; in the *Gumpert* case, the Second Circuit found that the plaintiff had failed to show that the official was held out by the defendant to possess the alleged authority; in the present case, the trial court found that the evidence failed to disclose that defendant held out Kaufman in such manner as to give Lind the right to believe that it had authorized Kaufman to give him the one percent override commission which he claimed; the Third Circuit made no finding on this point; in the *Gumpert* case, the Court held that alleged representations made by the agent are not a holding out by the principal and cannot be a basis for apparent authority; in the *Lind* case, the trial court made the same ruling but the Third Circuit did not deal with the problem.

We respectfully urge that these comparisons convincingly demonstrate that the Court of Appeals for the Third Circuit in finding "authority" (however designated by it) in Kaufman contravened the clear principles of the Law of Agency established by the decision of the Court of Appeals for the Second Circuit.

The Third Circuit ignores completely the decision of the First Circuit in the case of *Brownell* v. *Tidewater Associated Oil Company*, 121 F. 2d 239 (1st Cir. 1941). This neglect led the Third Circuit to contravene the basic principles of law governing apparent authority. In the *Brownell* case, Circuit Judge Mahoney, at page 244 of the opinion, ruled "the actions of the principal and the knowledge of a

reasonable man in the position of the third person are the important factors in establishing apparent authority". Judge Mahoney also sets forth the following definition of apparent authority as "that authority which a reasonably prudent man, induced by the principal's acts and conduct, in the exercise of reasonable diligence, and sound discretion, under similar circumstances, which the party dealing with the agent, and with like knowledge would naturally suppose the agent to have". In the *Brownell* case, the officer of the corporation alleged to have made the contract sued upon was the *Northeastern Division Manager;* in the *Lind* case, Kaufman was merely the Sales Manager for the New York Metropolitan area. In the *Brownell* case, it was established that the officer in question admittedly had power to make certain contracts and yet the First Circuit held that in spite of this position he did not have the apparent authority to make the commission agency agreement sued upon.

The Third Circuit should have considered the similarity of the factual situation in the *Brownell* case to that in the *Lind* case and the admittedly broader powers of the Northeastern Division Manager as compared to those of Kaufman, the Metropolitan Sales Manager. Had it done so it would have had no choice but to have affirmed the trial court's action.

The Third Circuit also rejected the holding of the Tenth Circuit in the case of *Berryhill* v. *Ellett, et al.*, 64 F. 2d 253 (10th Cir. 1933). Here, too, we find the same general principles of the law of inherent, implied and apparent authority discussed and applied. The same reasoning found in the *Gumpert* and *Brownell* cases is also applied in the *Berryhill* case.

The Third Circuit, in its opinion, recognized the rule of law that "apparent authority arises when a principal acts in such a manner as to convey the impression to a third

party that an agent has certain powers which he may or may not actually possess". It also defines implied authority. In its opinion (Appendix, p. A-6) it is stated:

> "'Implied authority' has been variously defined. It has been held to be actual authority given implicitly by a principal to its agent. Another definition of 'implied authority' is that it is a kind of authority arising solely from the designation by the principal of a kind of agent who ordinarily possesses certain powers."

However, as we have demonstrated earlier in this section of the brief, the test which they actually applied in reaching the conclusion that inherent authority existed in Kaufman does not meet the Third Circuit's own definition and is completely at variance with the other Circuit Court opinions above referred to. In its Opinion (Appendix, p. A-7), the Third Circuit stated what was to them the prime factor in determining how apparent or inherent authority was established when it pointed out "Kaufman was Lind's direct superior, and was the man to transfer communications from the upper executives to the lower". Nowhere in the Opinion do we find any other reference to anything concerning Kaufman which would support the conclusion of the Court that apparent or inherent authority existed in him. Assuredly, the decisions of the First, Second and Tenth Circuits do not even suggest that such a test is sufficient for a finding that inherent or apparent authority was present. We are confident that this Court can think of literally thousands of situations where an immediate superior is "the man to transfer communications from the upper executive to the lower" without establishing that such superior has the inherent or apparent authority to double, triple or quadruple the "lower" employee's salary.

One of the tests laid down by all the Courts for determining the existence of apparent authority is that the person dealing with the agent must reasonably believe that the agent is clothed with the authority which he purports to be exercising. Lind had been employed by Park and Tilford (now Schenley Industries, Inc.) for many years prior to the alleged conversation and must have known at the time that the alleged offer was made in April or July of 1951 that none of the executives in the Company on any level right up to the office of President had any arrangement whereby they received both salaries and commissions. He should further have known what compensation Rogers and Weiner, the two men who were performing duties similar to his as assistants to Kaufman in the New York Sales Office, received by way of compensation. We would be naive if we did not believe that Lind knew with reasonable accuracy the compensation that Kaufman, Reiner and Herrfeldt, his three immediate superiors in the Sales Department, were receiving. Against such a background, can we conclude that Lind reasonably believed Kaufman to be clothed with the authority to increase his compensation to such an extent that he was receiving more than anyone else in the Sales Department, up to and including his three superiors; and particularly that Kaufman would make an arrangement with Lind as supervisor assisting him, both working on a straight salary, which would result in Lind receiving a salary and commission greatly in excess of the salary which was all that Kaufman himself would continue to receive.

The decision below in addition to contravening the general principles of law governing inherent, implied and apparent authority as established by other Circuit Courts of Appeal also completely disregarded the fundamental rules of law set forth in the New York case of *Noyes* v.

Irving Trust Company, 1937, 250 App. Div. 274, 294 N. Y. S. 2 (App. Div. 1st Dept. 1937) aff'd. 275 N. Y. 520, 11 N. E. 2d 323 (1937), which held that a contract for the payment of a bonus based upon a percentage of company profits required *express authority* on the part of the corporate official allegedly making such contract. The Court in that opinion stated:

> "It is well settled that a contract of this character is not the usual and ordinary contract which one authorized to employ agents and servants may make. It would require express authority. *Chard* v. *Ryan Parker Construction Company*, 182 App. Div. 455, 169 N. Y. S. 622; Mechem on Agency (2d Ed.) sec. 988 pps. 711-712. The rule is founded upon sound business considerations and one entering into such a contract is bound to inquire as to the agent's authority."

The same basic rule was enunciated in *Camacho* v. *The Hamilton Bank Note and Engraving Company*, 2 App. Div. 369 (App. Div. First Dept. 1896) where it was held that the Vice President and General Manager of a corporate employer did not have apparent authority to bind his principals to contracts of "an extraordinary nature and of such character as would involve the corporation in enormous obligations".

The claimed agreement in this case is of such an extraordinary nature and being outside the ordinary and usual character of employment agreements would not have been sustained by the Courts of the State of New York as being within the apparent authority of the agent (a sales manager for Metropolitan New York), particularly since there was no inquiry as to authority of the agent.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari to the United States Court of Appeals, Third Circuit, and the United States District Court for the District of New Jersey should be granted.

MILTON, MCNULTY & AUGELLI,
Attorneys for Petitioner,

By JOHN MILTON, JR.,
A Member of Said Firm.

APPENDIX.

Opinion of the Court of Appeals for the Third Circuit.

(Filed April 6, 1960)

By Biggs, Chief Judge.

This is a diversity case. Lind, the plaintiff-appellant, sued Park & Tilford Distiller's Corp.,[1] the defendant-appellee, for compensation that he asserts is due him by virtue of a contract expressed by a written memorandum supplemented by oral conversations as set out hereinafter. Lind also sued for certain expenses he incurred when moving from New Jersey to New York when his position as New Jersey State Manager of Park & Tilford terminated on January 31, 1957. The evidence, including Lind's own testimony, taking the inferences most favorable to Lind, shows the following. Lind had been employed for some years by Park & Tilford. In July 1950, Lind was informed by Herrfeldt, then Park & Tilford vice-president and general sales-manager, that he would be appointed assistant to Kaufman, Park & Tilford's sales-manager for metropolitan New York. Herrfeldt told Lind to see Kaufman to ascertain what his new duties and his salary would be. Lind embarked on his new duties with Kaufman and was informed in October 1950, that some "raises" had come through and that Lind should get official word from his "boss", Kaufman. Subsequently, Lind received a communication, dated April 19, 1951, signed by Kaufman, informing Lind that he would assume the title of "District Manager". The letter went on to state: "I wish to inform you of the fact that you have as much responsibility as a State Manager and that you should consider yourself to be of the same

[1] Park & Tilford Distiller's Corp. was merged into Schenley Industries, Inc., a Delaware corporation, before the commencement of this action, with Schenley assuming all of Park & Tilford's obligations. Schenley was substituted in this action on March 31, 1958, by order of Judge Wortendyke.

status." The letter concluded with the statement: "An incentive plan is being worked out so that you will not only be responsible for increased sales in your district, but will benefit substantially in a monetary way." The other two district managers under Kaufman received similar memoranda. Lind assumed his duties as district sales manager for metropolitan New York. During the weeks following Lind's new appointment, Lind inquired of Kaufman frequently what his remuneration would be under the incentive plan referred to in the letter of April 19, 1951, and was informed that details were being worked out. In July 1951, Kaufman informed Lind that he was to receive 1% commission on the gross sales of the men under him. This was an oral communication and was completely corroborated by Mrs. Kennan, Kaufman's former secretary, who was present. On subsequent occasions Lind was assured by Kaufman that he would get his money. Lind was also informed by Herrfeldt in the autumn of 1952 that he would get a 1% commission on the sales of the men under him. Early in 1955, Lind negotiated with Brown, then president of Park & Tilford, for the sale of Park & Tilford's New Jersey Wholesale House, and Brown agreed to apply the money owed to Lind by reason of the 1% commission against the value of the goodwill of the Wholesale House. The proposed sale of the New Jersey Wholesale House was not consummated.

Notice to produce various records of Lind's employment was served on Park & Tilford but one slip dealing with Lind's appointment as district manager was not produced and is presumed to have been lost. The evidence was conflicting as to the character of the "incentive compensation" to be offered Lind in connection with his services as a district manager. Herrfeldt designated the incentive an "added incentive plan with a percentage arrangement". Kaufman characterized the plan as "bonuses and contests". Weiner, Park & Tilford's Secretary, said that the incentive was a "pension plan." Kaufman testified, however, that

the pension plan had nothing to do with the bonus incentive he referred to.

The record also shows that Lind commenced his employment with Park & Tilford in 1941, that from 1942 to 1950 he worked on a commission basis, that on August 31, 1950, he became an assistant sales manager for the New York metropolitan area at $125 a week, which was raised to $150 a week on October 1, 1950, plus certain allowances. After Lind became district manager on April 19, 1951, he continued to receive the same salary of $150 a week but this was increased to $175 in January 1952. On February 1, 1952, Lind was transferred from New York to New Jersey to become state manager of Park & Tilford's business in New Jersey. He retained that position until January 31, 1957, when he was transferred back to New York.

Park & Tilford moved for but was denied a directed verdict at the close of all the evidence under Rule 50, Fed. R. Civ. Proc., 28 U.S.C. However, the court below invoked Rule 50(b)[2] and submitted the case to the jury subject to a later determination of the legal questions raised by Park & Tilford's motion to dismiss. The court then requested

[2] Rule 50(b) provides as follows: "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

the jury to answer the following five questions: "1. Did Kaufman offer plaintiff one percent of gross sales effected by the salesmen under plaintiff?" "2. If the answer to question 1 is yes, when was plaintiff to commence such commissions?" "3. If the answer to question 1 is yes, when was the commission arrangement to terminate?" "4. Did defendant cause the plaintiff to believe that Kaufman had authority to make the offer to plaintiff referred to in question 1?" "5. Was plaintiff justified in presuming that Kaufman had the authority to make the offer?"

The answers provided by the jury amounted to a determination that Kaufman did offer Lind a 1% commission on the gross sales of the men under him; that the agreement commenced April 19, 1951; that the agreement terminated February 15, 1952, the date of Lind's transfer to New Jersey; that Park & Tilford did cause Lind to believe that Kaufman had authority to offer him the one percent commission; and that Lind was justified in assuming that Kaufman had the authority to make the offer. In addition, the jury awarded Lind $353 as reimbursement for moving expenses incurred by him at the termination of his position as New Jersey State Manager.

The jury did not give a dollar award for the commission deemed owing but the court "molded" the verdict in accordance with the jury's findings and judgment was rendered in favor of Lind against Schenley for $36,953.10 plus interest for the commission and $353.00 for the moving expenses. However, the judgment was nullified by the court's decision to enter a verdict for the defendant under Rule 50(b) in accordance with Schenley's first motion. The court, also under Rule 50(b), granted a new trial in the event that the judgment in favor of the defendant was subsequently reversed. See 167 F. Supp. 590 (1958).

THE JUDGMENT FOR DEFENDANT.

The decision to reverse the verdict for Lind with respect to the 1% commission was based on two alternative

grounds. First the court found that Lind had failed to prove a case of apparent authority in that the evidence did not disclose that Park & Tilford acted in such a manner as to induce Lind to believe that Kaufman had been authorized to offer him the 1% commission. Also the court concluded that the issues of "actual" and "implied" authority had somehow been eliminated from the case. Second, the court reasoned, that even if the jury could find apparent authority, the alleged contract was not sufficiently definite nor specific to be enforceable against Park & Tilford. The trial judge rejected a contention by Park & Tilford that a document signed by Lind on January 31, 1957, upon receiving his last pay check as New Jersey State Manager, should be construed as a release of his claims for commissions.

A federal court sitting in a diversity case must apply the same law as would a court of the state in which the district court is located. Erie R. Co. *v.* Tompkins, 304 U. S. 64 (1938). We therefore must look initially to New Jersey law. But the contract at bar was made and was to be performed in New York and since we must apply the New Jersey doctrines of conflicts of law, Klaxon *v.* Stentor Elec. Mfg. Co., 313 U. S. 487 (1941), the substantive law of contracts and agency applicable here will be that of New York. James B. Rhodes & Co. *v.* Chausovsky, 137 N. J. L. 459, 60 A. 2d 623 (1948); Polyckronos *v.* Polyckronos, 17 N. J. Misc. 265, 8 A. 2d 205 (1939).

The principle of Erie R. Co. *v.* Tompkins does not determine the division of functions between court and jury. This is controlled solely by Federal law. Ettelson *v.* Metropolitan Life Ins. Co., 137 F. 2d 62 (3 Cir.), *cert. den.*, 320 U. S. 777 (1943); Diederich *v.* American News Co., 128 F. 2d 144 (10 Cir. 1942). Federal law provides that the answers to questions relating to the scope and extent of an agent's apparent authority are for the triers of the facts, here the jury. See Gilmore *v.* Royal Indemnity Co., 240 F. 2d 101 (5 Cir. 1956). Parenthetically, it may be noted that the

New York rule on this point is identical. Hedeman v. Fairbanks, Morse & Co., 286 N. Y. 240, 36 N. E. 2d 129 (1941). The jury clearly found that Kaufman had apparent agency power to offer Lind the 1% commission and this verdict may be reversed only if there is no substantial evidence which could support the verdict. Snead v. New York Cent. R. Co., 216 F. 2d 169 (1954); Stanford v. Pennsylvania R. Co., 171 F. 2d 632 (1948).

The problems of "authority" are probably the most difficult in that segment of law loosely termed, "Agency". Two main classifications of authority are generally recognized, "actual authority", and "apparent authority". The term "implied authority" is often seen but most authorities consider "implied authority" to be merely a sub-group of "actual" authority. Mechem, Agency, §§51-60 (4th ed. 1952). An additional kind of authority has been designated by the Restatement, Agency 2d, §§8A and 161(b) as "inherent agency". Actually this new term is employed to designate a meaning frequently ascribed to "implied authority".

"Actual authority" means, as the words connote, authority that the principal, expressly or implicitly, gave the agent. "Apparent authority" arises when a principal acts in such a manner as to convey the impression to a third party that an agent has certain powers which he may or may not actually possess. "Implied authority" has been variously defined. It has been held to be actual authority given implicitly by a principal to his agent. Another definition of "implied authority" is that it is a kind of authority arising solely from the designation by the principal of a kind of agent who ordinarily possesses certain powers. It is this concept that is called "inherent authority" by the Restatement. In many cases the same facts will support a finding of "inherent" or "apparent agency.". Usually it is not necessary for a third party attempting to hold a principal to specify which type of authority he relies upon, general proof of agency being sufficient. Pacific Mut. Life Ins.

Co. *v.* Balton, 50 F. 2d 362 (5 Cir. 1931), *cert. den.* 284 U. S. 647 (1931).

In the case at bar Lind attempted to prove all three kinds of agency: actual, apparent, and inherent, although most of his evidence was directed to proof of "inherent" or "apparent" authority. From the evidence it is clear that Park & Tilford can be held accountable for Kaufman's action on the principle of "inherent authority". Kaufman was Lind's direct superior, and was the man to transfer communications from the upper executives to the lower. Moreover, there was testimony tending to prove that Herrfeldt, the vice-president in charge of sales, had told Lind to see Kaufman for information about his salary and that Herrfeldt himself had confirmed the 1% commission arrangement. Thus Kaufman, so far as Lind was concerned, was the spokesman for the company.

It is not necessary to determine the status of the New York law in respect to "inherent agency" for substantially the same testimony that would establish "inherent" agency under the circumstances at bar proves conventional "apparent" agency. The Restatement, Agency 2d (s. defines "apparent agency" as "the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." There is some uncertainty as to whether or not the third person must change his position in reliance upon these manifestations of authority, but this is of no consequence in the case at bar since Lind clearly changed his position when he accepted the job of district manager with its admittedly increased responsibilities. There is no doubt that New York accepts the "apparent authority" doctrine if change of position is shown. In Wen Kroy Realty Co. *v.* Public Nat. Bank & Trust Co., 250 N. Y. 84, 183 N. E. 73 (1932), one of the cases most frequently cited in the New York courts on this subject, Judge Lehman in the course of an opinion in which he did not find apparent

authority from the facts of the case before him, held nonetheless that: "[T]he principal is often bound by the act of his agent in excess or abuse of his actual authority, but this is only true between the principal and third person, who believing and having a right to believe that the agent was acting within and not exceeding his authority, would sustain loss if the act was not considered that of the principal." Further support for this position is found in Aneless Corporation *v.* Woodward, 262 N. Y. 362, 286 N. E. 800 (1933); Sam B. Levy Inc. *v.* Shapiro Bros. Factors Corp., 259 App. Div. 403, 19 N. Y. S. 2d 593, 595 (1940); Harvey *v.* J. P. Morgan Co., 166 Mis. 455, 2 N. Y. S. 2d 520 (1937), rev'd on other grounds, 25 S. 2d 636 (1938), 23 N. Y. S. 2d 844 (1940).

The opinion of the court below and the argument of the appellee here rely heavily on Gumpert *v.* Bon Ami Corporation, 251 F. 2d 735 (2 Cir. 1958), a diversity case decided under New York law, upholding the lower court's reversal of a jury verdict for the plaintiff. The facts in that case showed that Gumpert had been hired by Rosenberg, a director and member of the executive board of the Bon Ami company for a salary of $25,000 in cash plus $25,000 worth of the company's common stock. The Court of Appeals found that the jury could not properly find that the Bon Ami company had clothed Rosenberg with apparent authority to offer Gumpert $25,000 in common stock. This decision is inapposite for here we deal with an offer made by an employee's immediate superior, the man who represented the company to those under him, not a contract offered by one not an officer of a corporation to a prospective employee. Furthermore a salary of $25,000 in cash and $25,000 in common stock might well be deemed unusual enough to put the prospective employee on notice as to a possible lack of authority in the director to make the offer but the same may not be said of an offer of a commission to a salesman who had been habitually working on that basis, in a corporation that confined itself to selling others' products. It should be borne in mind also that a director, even if he be a

member of the executive board, does not ordinarily hire employees. Moreover in the case at bar there was evidence by an employee of Schenley that at least some state managers received 1% commissions.

Testimony was adduced by Schenley tending to prove that Kaufman had no authority to set salaries, that power being exercisable solely by the president of the corporation, and that the president had not authorized Kaufman to offer Lind a commission of the kind under consideration here. However, this testimony, even if fully accepted, would only prove lack of actual or implied authority in Kaufman but is irrelevant to the issue of apparent authority.

The opinion below seems to agree with the conception of the New York agency law as set out above but the court reversed the jury's verdict and the judgment based on it on the conclusion, as a matter of law, that Lind could not reasonably have believed that Kaufman was authorized to offer him a commission that would, in the trial judge's words "have almost quadrupled Lind's then salary". But Lind testified that before he had become Kaufman's assistant in September 1950, the latter position named being that which he had held before being "promoted" to district manager in April 1951, he had earned $9,000 for the period from January 1, 1950 to August 31, 1950, that figure allegedly representing half of his expected earnings for the year. Lind testified that a liquor salesman can expect to make 50% of his salary in the last four months of the year owing to holiday sales. Thus Lind's salary two years before his appointment as district manager could have been estimated by the jury at $18,000 per year, and his alleged earnings, as district manager, a position of greater responsibility, do not appear disproportionate. On the basis of the foregoing it appears that there was sufficient evidence to authorize a jury finding that Park & Tilford had given Kaufman apparent authority to offer Lind 1% commission of gross sales of the salesmen under him and that Lind reasonably had relied upon Kaufman's offer.

The second ground for setting aside the jury verdict was that the alleged contract was too indefinite and uncertain to be enforced against the defendant because no date of commencement or termination of the contract had been shown. Employment contracts often breed litigation because they frequently are informal, brief, and indefinite even when accompanied by correspondence. This is particularly so when dealing with a promotion within a relatively small office. However, as Corbin states, it has always been the law that "if the parties have concluded a transaction in which it appears that they intend to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left."[3] Williston adds that in contracts of service when no time of employment is fixed by the express terms of the contract, the apparent intention of the parties must be sought as a question of fact.[4] In the case at bar the jury made reasonable findings that the contract commenced on April 19, 1951, the date of the letter appointing Lind to his new position, and that the date of termination was February 15, 1952. This latter finding led the court to conclude that the jury's determination on this point was not proper since undisputed testimony indicated that Lind was appointed New Jersey State Manager effective February 1, 1952. However, as Lind points out, the pay records and pay slips[5] introduced by the defendant both carry Lind in the status of New York manager up to February 15, 1952. The jury was entitled to find that although Lind assumed a new position on February 1, 1952, his new pay status did not commence until February 15.

We conclude that the contract alleged was sufficiently definite and certain to be sustainable and that there was

[3] Corbin, Contracts, Section 95.

[4] 1 Williston, Contracts, Section 39.

[5] Defendant's Exhibits D-15 and D-103g.

ample evidence of extrinsic circumstances to permit the jury to fix the relevant dates for Lind's compensation as it did. It must be noted also that this is a case in which a plaintiff is suing for payment for a completed performance and it would be unjust to deny compensation on the ground of uncertainty of terms of employment if the facts afford a reasonable basis for filling in contractual lacunae.

An additional argument offered by Park & Tilford in support of the court's judgment is that a document signed by Lind when he terminated his employment with Park & Tilford can be construed as a release of Lind's claim to any further compensation. The opinion below dismissed this claim, holding that the writing was merely a receipt for wages and vacation benefits indisputably owing. We concur with the view of the trial court on this point.

The jury's verdict of $353 for Lind's moving expenses was also reversed because the court could find no proof that the "unnamed assistant" of Herrfeldt, who allegedly promised to reimburse Lind had any "express, implied or apparent authority to thus bind the corporation." An examination of the record indicates that this assistant was identified by Lind as John Niven, an "Administrative Assistant" to Herrfeldt, the corporation's vice president in charge of sales. Lind further testified that on the occasion of his moving from New York to New Jersey to assume the job of state manager, the company had paid his moving expenses. If the jury believed Lind's testimony, he clearly proved the apparent authority of Niven to bind the company to pay his moving expenses. There was no reason for Lind to doubt the word of an administrative assistant to the vice-president in a matter such as this in the light of his past experience. It must be remembered that when dealing with internal corporate management matters an employee must be able to rely on the word of his superiors, or their apparent spokesmen, lest operation of such organizations become impossible. A salesman cannot check every promise made to him by a superior with the president and the board

of directors of the corporation. For the reasons stated we think the court below erred in reversing the jury's verdict in Lind's favor for his moving expenses.

THE GRANTING OF THE MOTION FOR NEW TRIAL.

The district court granted the alternative motion for a new trial because it found the jury's verdict (1) contrary to the weight of the evidence, (2) contrary to law and (3) a result of error in the admission of evidence. Our conclusion that the verdict was not contrary to law automatically eliminates ground (2).

It is convenient to consider the evidentiary issue relating to point (3) first. A tabulated summary which purported to indicate the sales of liquor made during the years 1950 and 1951, compiled by personnel under Lind's supervision was admitted into evidence over the defense's objections on grounds of irrelevancy. It was on the basis of these records that Lind was able to establish the exact amount of the commissions he alleged were due him. The court below, however, in ruling upon the defendant's motion for a new trial declared that it had erred in admitting the documents because they were not made in the regular course of business so as to be admissible under 28 U.S.C. §1732.* It is interesting to note that the defense never

*28 U.S.C.A. §1732 provides as follows: "(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business,' as used in this section includes business, profession, occupation, and calling of every kind."

objected to these records on this ground. The records were kept by an employee of the defendant under Lind's supervision apparently pursuant to the instruction of the corporation as expressed in the inter-office memorandum dated April 19, 1951 from Kaufman to Lind alluded to above. The memorandum, in addition to notifying Lind of his new position as district manager outlined his future duties and item eight ordered him to maintain "supervision over records and sales figures for your district which will be kept in a central location in the office." It is difficult to see how these records could be termed anything other than "records kept in the regular course of business". The bare fact that the man who supervised the making of the records relies on them is no bar to their admission into evidence under 28 U.S.C.A. §1732. However, Section 1732 does provide that "all other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility". These records, then, were properly admitted into evidence and a new trial could not be granted on this ground.

The remaining basis for ordering a new trial is that the verdict was against the weight of the evidence. It is frequently stated that a motion for a new trial on this ground ordinarily is nonreviewable because within the discretion of the trial court. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940); Zegan v. The Central R.R. Co., 266 F.2d 101 (3 Cir. 1959); Menneti v. Evans Construction Co., 259 F.2d 367 (3 Cir. 1958). But this discretion must still be exercised in accordance with ascertainable legal standards and if an appellate court is shown special or unusual circumstances which clearly indicate an abuse of discretion in that the trial court failed to apply correctly the proper standards, reversal is possible. See *e.g.* Indamer Corporation v. Crandon, 217 F.2d 391 (5 Cir. 1954). Concededly appellate courts rarely find that the trial court abused its discretion.

In Commercial Credit Corp. *v.* Pepper, 187 F. 2d 71, 75-76 (5 Cir. 1951), Judge Borah stated: "It is a principle well recognized in the federal courts that the granting or refusing of a new trial is a matter resting within the discretion of the trial court. The term 'discretion', however, when invoked as a guide to judicial action, means a sound discretion, exercised with regard to what is right and in the interests of justice. And an appellate court is not bound to stay its hand and place its stamp of approval on a case when it feels that injustice may result. Quite to the contrary, it is definitely recognized in numerous decisions that an abuse of discretion is an exception to the rule that the granting or refusing of a new trial is not assignable as error." Thus an appellate court must still rule upon the propriety of an order for a new trial, even though the grounds for reversal are exceedingly narrow. But before any rational decision can be made, the reviewing court must know what standards the trial judge is bound to apply when ruling upon a motion for a new trial. These standards necessarily vary according to the grounds urged in support of the new trial. There is, however, little authority on what standards are to be applied in ruling on a motion for new trial on the grounds that the verdict is against the weight of the evidence beyond the simple maxim that the trial judge has wide discretion. The few available authorities are conflicting. Professor Moore concludes that while the trial judge has a responsibility for the result at least equal to that of the jury he should not set the verdict aside as contrary to the weight of the evidence and order a new trial simply because he would have come to a different conclusion if he were the trier of the facts. Professor Moore states in this connection: "[S]ince the credibility of witnesses is peculiarly for the jury it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict. The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence

and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts, and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not."[7]

Professor Moore's views are logical and persuasive and buttressed by some decisional authority. See Werthan Bag Corp. *v.* Agnew, 202 F. 2d 119, 122 (6 Cir. 1953) (question of damages). In the same vein, Schirra *v.* Delaware L. & W. R. Co., 103 F. Supp. 812, 820 (M.D. Pa. 1952), holds that "if there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion, and it is immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." Pelham *v.* Hendricks, 132 F. Supp. 774, 775 (M.D. Pa. 1955), goes further, ruling that: "The evidence and inferences reasonably deducible therefrom must be viewed in the light most favorable to the prevailing party, and the Court must assure that the jury followed the Court's instructions."

Miller *v.* Pacific Life Ins. Co., 17 F.R.D. 121, 125 (W.D. Mich. 1954), American Cooler Co. *v.* Fay & Scott, 20 F. Supp. 782, 783 (D.Me. 1937) and United States *v.* 13.40 Acres of Land, 56 F. Supp. 535, 538 (N.D. Cal. 1944), go farther in restricting the discretion of the trial judge for these authorities hold that the jury's verdict may not be set aside and a new trial ordered merely because the verdict is contrary to the preponderance of the evidence. The first of the two cases cited holds that the verdict "must be so manifestly and palpably against the evidence in the case as to compel the conclusion that the verdict is contrary to right and justice". And the second opinion cited states that a new trial may not be ordered unless, "The evidence as a

[7] 6 Moore's Federal Practice, 2d Ed. p. 3819.

whole, after according to it the highest probative force to which it is lawfully entitled, is insufficient to support the verdict." Judge Yankwich took a similar restricted view of his own discretion in ordering a new trial because the verdict was contrary to the weight of the evidence. In Lyophile-Cryochem Corp. *v.* Cutter Laboratories, Inc., 78 F. Supp. 903 (N.D. Cal. 1948), he recognized that a motion for a new trial may be granted if the trial judge is satisfied that the verdict was against the preponderance of the evidence but he took the position that the trial judge should not substitute his judgment on the facts for that of the jury except in extreme circumstances

But there is also some authority supporting an almost unlimited discretion in the trial judge in granting or denying a motion for a new trial. In Murphy *v.* United States District Court for the Northern District of California, Southern Division, 145 F. 2d 1018, 1020 (9 Cir. 1944), the Court of Apeals upheld the granting of a new trial by Judge Goodman in United States *v.* 1340 Acres of Land, *supra*. The appellate court found the trial judge's discretion in such matters was wider than did Judge Goodman himself. The appellate tribunal said that "The granting of a new trial is discretionary with the court and subject to no fixed rule except a consideration of what is just". But the exception stated is itself a potent one. The case of Grayson *v.* Deal, 85 F. Supp. 431 (N.D. Ala. 1949), stands for the proposition that the court may consider the evidence as a whole and weigh it, and if it considers that the jury was mistaken or that its verdict was wrong, although supported by evidence, a new trial should be granted.

What we have stated demonstrates that there is no consensus of opinion as to the exact standards to be used by a trial court in granting a new trial and that the criteria to be employed by an appellate tribunal charged with reviewing the trial judge's decision in this respect are equally indefinite. New trials granted because (1) a jury verdict is against the weight of the evidence may be sharply dis-

tinguished from (2) new trials ordered for other reasons: for example, evidence improperly admitted, prejudicial statements by counsel, an improper charge to the jury or newly discovered evidence. In the first instance given it is the jury itself which fails properly to perform the functions confided to it by law. In the latter instances something occurred in the course of the trial which resulted or which may have resulted in the jury receiving a distorted, incorrect, or an incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible. In the latter instances, (2), *supra*, the trial court delivered the jury from a possibly erroneous verdict arising from circumstances over which the jury had no control. Under these conditions there is no usurpation by the court of the prime function of the jury as the trier of the facts and the trial judge necessarily must be allowed wide discretion in granting or refusing a new trial.

But where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial.

Where a trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of

jurors a verdict should be scrutinized more closely by the trial judge than is necessary where the litigation deals with material which is familiar and simple, the evidence relating to ordinary commercial practices. An example of subject matter unfamiliar to a layman would be a case requiring a jury to pass upon the nature of an alleged newly discovered organic compound in an infringement action. See 3 Walker on Patents, Deller's *ed.*, Section 697. A prime example of subject matter lying well within the comprehension of jurors is presented by the circumstances at bar.

The subject matter of the litigation before us is simple and easily comprehended by any intelligent layman. The jury's main function was to determine the veracity of the witnesses: *i.e.* what testimony shold be believed. If Lind's testimony and that of Mrs. Kennan, Kaufman's secretary, was deemed credible, Lind presented a convincing, indeed an overwhelming case. We must conclude that the jury did believe this testimony and that the court below substituted its judgment for that of the jury on this issue and thereby abused its legal discretion.

The judgment of the court below will be reversed and the case will be remanded with the direction to the court below to reinstate the verdict and judgment in favor of Lind.

HASTIE, Circuit Judge, with whom KALODNER, Circuit Judge, joins, dissenting.

I agree that the order granting judgment for the plaintiff notwithstanding the verdict for the defendant, must be set aside. However, I think the majority make a serious mistake when they take the extraordinary additional step of reversing the alternative order of the trial judge, granting a new trial because he considered the verdict against the weight of the evidence.

This court has never before reversed an order of a trial judge granting a new trial because of his conclusion on all of the evidence that the jury had reached an unjust result. At least, neither I nor any of my colleagues can find a precedent in our court for such action. Rather, we have recognized that the function in question is broadly discretionary, "requiring that the trial judge evaluate all significant evidence, deciding in the exercise of his own best judgment whether the jury has so disregarded the clear weight of credible evidence that a new trial is necessary to prevent injustice." See *Zegan* v. *Central R. R. of New Jersey*, 1953, 206 F. 2d 101, 104. The opinions of other courts cited by the majority not only recognize that discretion but also emphasize its extreme breadth.

This traditional conception of the role of the trial judge has provided the one important limitation on the power of the jury to make an unimpeachable decision on the facts, even where the evidence is conflicting. The judge may not substitute the verdict he would have rendered on the evidence for that actually rendered by the jury. But he may avoid what in his professionally trained and experienced judgment is an unjust verdict by vacating it and causing the matter to be tried again by a second jury. Thus, the essential institution of jury trial is respected and an expedient middle ground is maintained between the absence of any control over a jury's verdict on conflicting evidence, on the one hand, and judicial usurpation of the fact finding function, on the other.

Under this scheme the only function of a reviewing court, once the trial court has ordered a new trial, is to see whether there can have been any basis in reason for the trial judge's conclusion as to the weight of the evidence and the injustice of the verdict. The majority do not challenge this view, though they do not state explicitly what their understanding of our role is.

The present record discloses a sharp conflict of testimony whether Kaufman, the metropolitan sales manager,

ever promised plaintiff, his subordinate district manager, a 1% commission on all gross sales of agents working under plaintiff. There are several remarkable aspects of this alleged promise which could reasonably have influenced the trial judge on this decisive issue. This commission would have more than quadrupled plaintiff's salary of $150 per week, making him much higher paid than his immediate superior, Kaufman or any other company executive, except the president. No other sales manager or supervisor received any such commission at all. Moreover, after the alleged promise was made, month after month elapsed with no payment of the 1% commission or indication of any step to fulfill such an obligation. Yet plaintiff himself admits that he made no formal demand for or inquiry about the large obligation for several years, and said nothing even informally about it to anyone for many months save for an occasional passing verbal inquiry said to have been addressed to Kaufman. The trial court may have reasoned that the amount said to have been promised was so abnormally large and plaintiff's concern about non-payment so unnaturally small as to make it incredible that the promise ever was made. In addition, the very vagueness of the alleged promise and the absence of any mention of time in it may have increased the incredulity of the judge who heard the evidence.

In such circumstances it was neither arbitrary nor an abuse of discretion for the trial judge to grant a new trial. Whether in the same circumstances some other trial judge or any member of this court would have let the verdict stand is beside the point.

The majority think the trial judge usurped the function of the jury. I think it is we who are impinging upon the function and discretion of the trial judge in a way that is serious, regrettable and without precedent in this court.

Order Amending Opinion of the Court of Appeals for the Third Circuit.

Present: BIGGS, *Chief Judge*, and GOODRICH, MCLAUGHLIN, KALODNER, STALEY, HASTIE, and FORMAN, *Circuit Judges*.

AND NOW, to wit, this 22nd day of June, 1960, it is

ORDERED that the opinion of this court filed on April 6, 1960, be and the same hereby is amended by striking the two sentences commencing on the 12th line of page 16 of the printed opinion reading as follows: "The first of the two cases cited holds that the verdict 'must be so manifestly and palpably against the evidence in the case as to compel the conclusion that the verdict is contrary to right and justice'. And the second opinion cited states that a new trial may not be ordered unless, . . .", and substituting in lieu thereof the following: "The first and second of the three cases cited hold that the verdict 'must be so manifestly and palpably against the evidence in the case as to compel the conclusion that the verdict is contrary to right and justice'. And the third opinion cited states that a new trial may not be ordered unless, ..."

By the Court,

BIGGS,
Chief Judge.

Judgment.

Present:

BIGGS, Chief Judge, and GOODRICH, MCLAUGLIN, KALODNER, STALEY, HASTIE and FORMAN, Circuit Judges.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the case remanded with directions to reinstate the verdict and judgment in favor of Dan Lind.

Attest:

IVA O. CRESKOFF,
Clerk.

April 6, 1960.

Statutes, Federal Rules, and Regulations Involved.

RULE 50.

MOTION FOR A DIRECTED VERDICT.

(a) When Made: Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

RULE 52.

FINDINGS BY THE COURT.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

(b) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

RULE 59.

NEW TRIALS; AMENDMENT OF JUDGMENTS.

(a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States, and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) *Time for Motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) *Time for Serving Affidavits.* When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On Initiative of Court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

RULE 73.

Appeal to a Circuit Court of Appeals.

(a) *When and How Taken.* When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law; except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court,

may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

(b) *Notice of Appeal.* The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than the party or parties taking appeal, but his failure so to do does not effect the validity of the appeal. The notification to a party shall be given by mailing a copy of the notice of appeal to his attorney of record or, if the party is not represented by an attorney, then to the party at his last known address, and such notification is sufficient notwithstanding the death of the party or of his attorney prior to the giving of the notification. The clerk shall note in the civil docket the names of the parties to whom he mails the copies, with date of mailing.

* * * * * *

Advisory Committee's Report (June 1946) of Proposed Amendments to Rules of Civil Procedure for District Courts of U. S. Proposed Amendment to Rule 50.

RULE 50.

MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT.

(a) ~~When Motion Effect~~ *Motion For Directed Verdict.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A

motion for a directed verdict shall state the specific grounds therefor.

(b) ~~Reservation Of Decision On Motion~~ *Motion For Judgment.* ~~Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.~~ Within 10 days after the reception of a verdict, a party who has moved for a directed verdict *at the close of all the evidence* may move to ~~have~~ *set aside* the verdict and any judgment entered thereon ~~set aside~~ and ~~to have~~ *for* judgment ~~entered~~ in accordance with his motion for a directed verdict. ~~; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the~~ *The* court may allow the *verdict or* judgment to stand or may ~~reopen the judgment~~ *set it aside* and either order a new trial or direct the entry of judgment ~~as if the requested verdict had been directed~~ *for the moving party. The making of a motion for judgment in conformity with the motion for a directed verdict shall not be necessary for the purpose of raising on review the question whether the verdict should have been directed or whether judgment in conformity with the motion for a directed verdict should be entered.* If no verdict ~~was~~ *is* returned, the court *on motion made within 10 days after the jury has been discharged* may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

A motion for a new trial, as an alternative, may be joined with a motion for judgment. If the motion for judgment is granted, the court in its discretion may either refrain from ruling upon the motion for new trial or rule upon it by determining whether it should be granted if the judgment is thereafter vacated or reversed. The making of a

conditional order on the motion for new trial or the refraining from making such an order, does not affect the finality of the judgment. In case the alternative motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court shall have otherwise ordered. In case the alternative motion for a new trial has been conditionally denied and the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court. In case the district court has refrained from ruling upon the motion for a new trial when granting the motion for judgment and the judgment is reversed on appeal, the district court shall then dispose of the motion for a new trial unless the appellate court shall have otherwise ordered.

Order Remanding Judgment.

This matter being brought before the Court by Irving J. Soloway, Esq., attorney for plaintiff Dan Lind for entry of judgment in accordance with the mandate of the United States Court of Appeals for the Third Circuit, No. 12880, dated May 24, 1960, and it appearing that on July 11, 1958 judgment was entered in this Court in favor of plaintiff Dan Lind in the sum of $40,040.89 with costs and interest, and that said judgment was subsequently on motion December 2, 1958 set aside by this Court and judgment entered n.o.v. in favor of defendant Schenley Industries, and it further appearing that on April 6, 1960 judgment was entered in the United States Court of Appeals for the Third Circuit reversing the judgment of this Court entered December 2, 1958 and directing that the judgment of plaintiff be reinstated, it is on this 10th day of June, 1960

ORDERED that the judgment in this suit heretofore entered in favor of defendant Schenley Industries on December 2, 1958 be and hereby is set aside, and it is further

ORDERED that judgment in favor of plaintiff Dan Lind and against defendant Schenley Industries Inc. in the sum of $40,040.89 plus costs of $55.19 and interest heretofore entered on July 11, 1958, be and hereby is reinstated and entered in this cause, dated and effective as of July 11, 1958.

REYNIER J. WORTENDYKE, JR.

REYNIER J. WORTENDYKE, JR.
U. S. D. J.

We hereby consent to the form of the above order.

MILTON, McNULTY & AUGELLI

MILTON, McNULTY & AUGELLI Esq.
Attorneys for Schenley Industries Inc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 205.

SCHENLEY INDUSTRIES, INC.,

Petitioner,

vs.

PAX LIND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 205.

SCHENLEY INDUSTRIES, INC.,
Petitioner,

vs.

DAN LIND,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF OF PETITIONER.

Statement.

Petitioner, since the submission of the Petition for Certiorari, has located additional cases evidencing the conflict between the decisions of the Court of Appeals for the Third Circuit, and decisions rendered by other circuit courts concerning the interpretation of Rule 50(b) of The Federal Rules of Civil Procedure which should be brought to the attention of this Court.

Despite the fact that the propriety of the action of the Court of Appeals for the Third Circuit in setting aside the alternative order of the trial court granting a new trial is dealt with in the first point on pages 8 through 11 of the Petition for Certiorari, Respondent has indicated his belief that Petitioner has not raised this question.

Because of Respondent's action, Petitioner has also dealt a bit more extensively in this Reply Brief with the trial judges' historic role in awarding a new trial and the limitations on this imposed by the Third Circuit in this case.

Respondent's contention that Petitioner may not raise the question of jurisdiction at this time is without merit and we feel that our analysis of his cases will so demonstrate.

REASONS FOR GRANTING WRIT.

I. The interpretation of Rule 50(b) is contrary to decisions of this Court and other circuit courts of appeal.

As has previously been shown in the Petition for Certiorari, a direct conflict exists in the interpretation of the operation of Rule 50(b) of the Federal Rules of Civil Procedure between decisions of the Court of Appeals of the Third Circuit and the Court of Appeals of the Second, Sixth and Ninth Circuits (Petition, pages 8, 16 and 17). It has further been shown that, indeed, a conflict exists within the Third Circuit itself (Petition, page 11).

The assumption of jurisdiction by the Court of Appeals to review an order of the trial court granting a new trial, even though it be coupled with a final judgment n.o.v., is contrary to the decisions of other courts of appeal.

In *Koppal* vs. *Transcontinental and Western Air, Inc.*, 199 Fed. 2d 117 (8th Cir. 1952), Rev'd on other grounds, 345 U. S. 653, 73 Sup. Ct. 906 (1953), the situation was essentially similar to that presented here.

There, after the jury returned a verdict for the Plaintiff, the Court, on motion of the Defendant for Judgment n.o.v., or in the alternative for a new trial, entered an

order setting aside the verdict, giving judgment for the defendant, and further providing that if the judgment was reversed on appeal, the defendant be granted a new trial unless the plaintiff filed a remittitur directing the entry of judgment in a lower amount than the jury verdict. The plaintiff appealed. Upon review, the Court of Appeals held that the judgment n.o.v. must be reversed and stated that the granting of a new trial was not as such a reviewable order. It therefore declined to express its views on the correctness of the trial judges' action.

From the above, it is manifest that the court treated each aspect of the motion as a separate and distinct application. To that part of the motion dealing with judgment n.o.v., certain criteria applied. As to that part dealing with a new trial, the court determined it was powerless to review at that stage of the proceedings.

The right of appeal does not come from Rule 50(b). This rule neither purports nor undertakes to define or change the scope of appellate jurisdiction. The fact that the alternative grant of a new trial may be entered at the same time as a final judgment does not deprive the order pertaining to the new trial of its interlocutory nature. The two remedies are historically separate and distinct and the rules of law applicable to them reflect this.

The fact that the distinctions in the various procedural alternatives must be preserved is emphasized in *Morsh* vs. *Illinois Central Railroad Co.*, 175 Fed. 2d 498 (5th Cir. 1949). Judge Sibley speaks of the necessity of maintaining the distinctions on page 500, where it is said:

> "A motion for a directed verdict, or for a judgment notwithstanding the verdict under Rule of Civil Procedure 50, 28 U. S. C. A., raises a question of law only: Whether there is any evidence which, if believed, would authorize a verdict against movant.

> The trial judge in considering those motions does not exercise discretion, but makes a ruling of law, and if he errs the appellate court may reverse. A motion for new trial is addressed to the trial judge's discretion. He may grant a new trial if he thinks he has committed error; and he may grant one (and he alone can) because he thinks the verdict is wrong, though supported by some evidence. The exercise of his discretion is not ordinarily reviewable on appeal, though a failure to exercise discretion, or an abuse of it, may be corrected. The motion for a new trial is entirely independent of the other two motions and is governed by different principles, and has a different result. It never supersedes the jury, but as its name states, it results in another jury trial, perhaps with different evidence produced. But the motion for directed verdict or for judgment notwithstanding the verdict if granted, ends the case.
>
> "Rule of Civil Procedure 50, while altering the procedure in federal courts, did not alter the nature and effect of these motions, and each is entitled to be decided according to the principles applicable to it without confusing them. Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 61 S. Ct. 189, 85 L. Ed. 147."

The position of the 8th Circuit was re-examined and clarified in 1958. In *Gallon* vs. *Lloyd-Thomas Company*, 261 Fed. 2d 26 (8th Cir. 1958) a suit was instituted for rescission of a contract of employment and the defendant employer counterclaimed. The jury returned a verdict in favor of the plaintiff on each of the five counts of his complaint, and found against the defendant on his counterclaim.

After trial, on motion, the court entered judgment n.o.v. for the defendant on two counts of the complaint and further, as to the entire five counts, granted a new trial.

As to the two counts where judgment n.o.v. had been previously granted, the new trial was conditioned upon reversal of this judgment upon appeal. In addition, the defendant was granted a new trial as to the counterclaim.

The plaintiff appealed from the order granting the judgment n.o.v. and the new trial in the alternative on the two counts, and also from the order granting a new trial on the remaining three counts. Judge Mathes' opinion stated the matter clearly:

> "At the outset, we raise, *sua sponte*, the question of our jurisdiction to entertain this appeal. For impelling legal reasons, which we shall presently point out, we are driven to the conclusion that the case is not properly before us, and jurisdiction remains in the trial court.
>
> "The after-trial action by the court did not finally dispose of all of the issues so as to constitute a final decision within the meaning of Title 28 U. S. C. A. 1291, which provides that courts of appeal shall have jurisdiction of appeals from all *final* decisions of the district courts. As we have seen, defendant's motion for judgment notwithstanding the verdict was sustained as to Counts I and IX, and judgment rendered accordingly. But, as to the three remaining counts upon which plaintiff had prevailed, and defendant's counterclaim, the Court directed a new trial.
>
> "It is a firmly entrenched principle of federal jurisprudence that a motion for new trial is directed to the sound discretion of the trial court. Stofer *v.* Montgomery Ward & Co., 8 Cir., 249 F. 2d 285, 288; Agnew *v.* Cox, 8 Cir., 254 F. 2d 263, 267-268; Hobart *v.* O'Brien, 1 Cir., 243 F. 2d 735, 744, certiorari denied 355 U. S. 830, 78 S. Ct. 42, 2 L. Ed. 2d 42, rehearing denied 355 U. S. 879, 78 S. Ct. 139, 1 L. Ed. 2d 110; Phoenix Indemnity Co. *v.* Gironard, 5 Cir., 252 F. 2d 146, 148, and the granting or denial of a

> new trial is not an appealable order. In Buder *v.* Fiske, 8 Cir., 174 F. 2d 269, at page 265, modified 177 F. 2d 907, this Court, in so holding, stated: 'Such determination may be challenged—on the ground of abuse of discretion—in an appeal from the *final judgment*. Marshall's U. S. Auto Supply, Inc. *v.* Cashman, 10 Cir., 111 F. 2d 140, 141.' * * *"

It should be pointed out to the Court at this time that there are apparently two factors limiting the exercise of the power of review by the Appellate Courts.

The first is jurisdictional and stems from the limitations imposed by Title 28, Sections 1291 and 1292, which confine appellate jurisdiction to final decisions and certain specified interlocutory orders. Under this limitation, orders *granting* new trials may not be reviewed, even for abuse of discretion, until after the rendition of final judgment in the second trial. *Koppal* vs. *Transcontinental and Western Air, Inc., supra; Gallon* vs. *Lloyd-Thomas Company, supra.* On the other hand, orders *denying* a new trial, where a final judgment is entered contemporaneously, may be appealed at this stage since this constitutes a final disposition of the matter. *Commercial Credit Corp., v. Pepper*, 187 Fed. 2d 71 (5th Cir. 1951).

The second is a limitation imposed by the Appellate Courts upon themselves arising, perhaps, out of the Judiciary Act of 1789 or resting on that part of the Seventh Amendment which provides that no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of common law. This limitation, however, does not extend to instances where the trial court has been guilty of an abuse of discretion. It is applicable only to instances where review of the granting or denial of a new trial is sought on the alleged ground that the trial court made erroneous findings of fact and

includes determinations concerning the weight of the evidence. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 53 S. Ct. 252 (1933); *U. S.* v. *Johnson*, 327 U. S. 106, 66 S. Ct. 464 (1946). Where review is sought for error of law, the limitation does not apply. It does, however, apply equally as well where an appeal is taken from a judgment and order *denying* a new trial in the first instance as where an appeal from the judgment and order granting *a new trial* is taken after the entry of judgment in the second trial. *Portman* vs. *American Home Products Corp.*, 201 F. 2d 847 (2nd Cir. 1953).

The case of *Pettingill* v. *Fuller* (1939) 107 F. 2d 933, cited by Respondent on p. 3 of his brief, is an instance of the practice outlined above, where the Court granted review of an order granting a new trial after the entry of final judgment in the second trial. On p. 936 the Court expressly states:

> "The question whether an order granting or denying a motion for a new trial may be reviewed on appeal when not followed by a final judgment entered after a new trial is not involved in the case at bar. Here we are reviewing an interlocutory order after final judgment in the action."

The case of *Kanatzar* v. *Chrysler Corp.*, 195 F. 2d 104 (10 Cir. 1952) cited by Respondent on p. 6 his brief is in complete accord with the position of Petitioner. This was an attempt to review an order granting a new trial. The Court expressly held that such an order was not appealable. It outlines in its opinion the types of orders which are appealable in Section 1292 of Title 28. And hence when in its concluding sentence the Court makes the statement quoted by Respondent that an order granting a new trial "is open to review through regular channels only on appeal from a final judgment subsequently entered or on appeal from

an appealable order" it was unquestionably referring to those interlocutory orders enumerated under Section 1292.

There is no authority in the cases for the statement of Professor Moore quoted on p. 5 of Respondent's brief; rather it is a conclusion from a statement appearing on p. 3896 of the same volume to the effect that an order for a new trial, unless conditional, destroys the finality of a judgment n. o. v. But on a logical basis the converse should also be true. A final judgment n. o. v. does not destroy the interlocutory nature of a conditional order for a new trial.

Furthermore on practical grounds, to permit an appeal in the initial stage would be premature, since the aggrieved party might prevail on the second trial and obviate the necessity of the Appellate Court considering the question at all.

It has come to our attention since filing our Petition that this Court, in addition to refusing to accept the amendment to Rule 50(b) made by the Advisory Committee on the Rules of Civil Procedure in 1946, resisted another attempt to permit the Appellate Courts to invade the power of the trial judge to grant a new trial made in the proposed amendment to the rules which was submitted under date of October, 1955. The proposed change to Rule 50 which was rejected by the Court was the following:

> *"(c) Same; Conditional Rulings on Grant of Motion.*
> *"(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed. If the motion for new trial is thus conditionally granted, the court shall specify the grounds therefor, and such an order does not affect the finality of the judgment. In case the motion for new trial has been conditionally granted and the judgment is*

reversed on appeal, the new trial shall proceed unless the appellate court shall have otherwise ordered. In case the motion for new trial has been conditionally denied and the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court." U. S. Code Cong. & Ad. News (1956) Vol. 3, page 5175.

The repeated rebuffs given by this Court to attempts thus to derogate from the power of the trial judge to grant new trials indicate that in doing so this Court had in mind the limitations imposed on the appellate jurisdiction by Section 1291 and the policy of confining appellate review referred to above. However, we submit that the confusion which has continued to persist among the Circuit Courts of Appeal and the members of the Bar on this subject, as evidenced by the court's conflicting decisions and the continued attempts of the Advisory Committees to extend the purview of Rule 50 beyond the limits which the statute and the policy of the Appellate Courts impose should be clarified by this Court. As it holds the prime responsibility for the proper functioning of the Federal judiciary, and since, in the past, this Court has accepted for review cases involving interpretation of the Federal Rules of Civil Procedure, Petitioner respectfully submits that a case is again at hand where certiorari should be granted.

II. A Question as to the existence of Jurisdiction of the subject matter may properly be raised for the first time at this juncture of the case.

The question Petitioner raises is that of the existence of jurisdiction over the subject matter as opposed to jurisdiction of the person. This involves the fundamental power of a court to hear and decide a cause on its merits and, as such, may not be conferred upon it by the litigants by either

consent or waiver. *In re Martinez*, 241 F. 2d 345 (10th Cir., 1957); *Rensing* v. *Turner Aviation Corp.*, 166 F. Supp. 790 (D. C. Ill., 1958). This being so, a question as to the existence of such power may be raised at any time.

The nature of this type of jurisdiction is such that even if the litigants fail to raise the question, this Court is obliged to do so by virtue of the nature and limits of the judicial power of the United States. Thus, this Court should not only satisfy itself of its own jurisdiction, but also review and satisfy itself as to the jurisdiction of the court from which the appeal comes.

As is said in *Mansfield C & L. M. R. R. Co.* v. *Swan*, 111 U. S. 382, 4 S. Ct. 510 (1884):

> "(T)he first and fundamental question is that of jurisdiction—first of this court and then of the court from which the record comes."

The case of *King Iron Bridge & Manufacturing Co.* v. *Otoe County*, 7 S. Ct. 552, 120 U. S. 225 (1887) reversing 27 F. 800 (8th Cir. 1886) is also cited in support of this proposition.

It is respectfully submitted that the cases cited by Respondent, when closely examined, lend little if any support to his contention that this jurisdictional question may not be raised at this time. In only one of the cases cited by him is the question of jurisdiction over the subject matter raised in the first instance in this Court. *Gibbs* v. *Harris*, 189 U. S. 475, 47 L. Ed. 909 (1903).

There, it was contended for the first time when a case reached this Court, that the Court of Appeals lacked jurisdiction because the bill failed to mention threatened damage exceeding $2,000, and at that time it was required by statute that bills contain an allegation of damage in excess of $2,000 in order to obtain review by the Court of Appeals. The court held that since earlier cases had clearly estab-

lished that damage such as the petitioner was claiming could exceed $2,000, and since this minor defect could readily be removed by amendment of the bill, the court would overlook this trifle. Further support for the Court's action was found in an earlier case with an identical factual situation.

The jurisdictional question which Petitioner raises at this time is obviously of serious import and of far more significance than that raised in the *Giles* case. It is not a defect that can be cured by amendment, nor can it be overlooked. Its serious nature far outweighs any oversight Petitioner or the Court of Appeals for the Third Circuit may have been guilty of committing. *Zalznek* v. *Sias*, 248 F. 2d 234 (6th Cir., 1957); *Collier* v. *Piccard*, 237 F. 2d 234 (6th Cir., 1956).

III.—The Decision Below Contravenes the Principles heretofore established by the Decisions of other Circuit Courts of Appeal with respect to the Broad Discretion given to the trial judge to grant or deny a Motion for a new trial.

The petition for certiorari indicates Petitioner's concern, not only with the jurisdictional aspect of the Court of Appeals' review of the motion for a judgment n.o.v., and in the alternative for a new trial, but also with the new and far reaching classifications which the court abruptly established as a guide to future determinations in this area (Petition, page 3).

The dissenting opinion filed by Judge Hastie, which emphasizes this aspect of the decision is a succinct and accurate statement of Petitioner's position (Appendix, page A 18). Petitioner has also reviewed those cases cited in the majority opinion as establishing the criteria which the

trial court must follow in the exercise of its discretion, and respectfully questions whether such broad reliance as has been placed upon them is justified.

The far reaching import of the standards promulgated in this case is such that immediate consideration of it by this Court is required. In light of the broad discretion heretofore granted a trial court in this area, and in view of the great and immediate effect this decision will have, not only on the innumerable future motions that will be made under the provisions of Rule 59 (b), but also under Rule 59 of the Federal Rules of Civil Procedure, it would appear that this new determination should be promptly reviewed in order that the error into which we submit the Third Circuit has fallen should not lead to further confusion and uncertainty among the courts and the Bar of the Nation.

That this confusion exists, the Third Circuit itself admits in its opinion where it discusses the cases of *Miller* v. *Pacific Life Ins. Co.*, 17 F. R. D. 121, 125 (W. D. Mich. 1954), *American Cooler Co.* v. *Fay & Scott*, 20 F. Supp. 782, 783 (D. Me. 1937) and *United States* v. *15.40 Acres of Land*, 36 F. Supp. 535, 538 (N. D. Cal. 1940) (Pet. A-15), which it deems reflect a restrictive view of the trial judge's permissive discretion and then goes on to say:

> "But there is also some authority supporting an almost unlimited discretion in the trial judge in granting or denying a motion for a new trial. In Murphy *v.* United States District Court for the Northern District of California, Southern Division, 145 F. 2d 1018, 1020 (9 Cir. 1944), the Court of Appeals upheld the granting of a new trial by Judge Goodman in United States *v.* 1340 Acres of Land, *supra*. The appellate court found the trial judge's discretion in such matters was wider than did Judge Goodman himself. The appellate tribunal said that 'The granting of a new trial is discretionary with the

court and subject to no fixed rule except a consideration of what is just'. But the exception stated is itself a potent one. The case of Grayson v. Deal, 85 F. Supp. 431 (N. D. Ala. 1949), stands for the proposition that the court may consider the evidence as a whole and weigh it, and if it considers that the jury was mistaken or that its verdict was wrong, although supported by evidence, a new trial should be granted.

"What we have stated demonstrates that there is no consensus of opinion as to the exact standards to be used by a trial court in granting a new trial and that the criteria to be employed by an appellate tribunal charged with reviewing the trial judge's decision in this respect are equally indefinite. * * *" (Pet. A-16)

Advocacy of the less restrictive view is also to be found in Judge Lurton's opinion in *Mt. Adams & EP Inclined Railway Co.* v. *Lowery*, 74 Fed. 463, at 476-7 (6 Cir. 1896) and in the opinion of Judge Parker in *Garrison* v. *U. S.*, 62 Fed. 2d 41 (4th Cir. 1932), who said (p. 42):

"In addition to this, the trial judge should not hesitate to give the jury the benefit of his views as to the facts, leaving to them, however, the final determination of the issue. Then, if they return a verdict which in his opinion is clearly wrong, he should not hesitate to set it aside and grant a new trial."

We note the Third Circuit reference to "some authority" supporting an almost unlimited discretion in the trial judge. It is interesting to inquire how extensive the authority for the less restrictive view actually is.

In sharp contrast with the restrictive view of the scope of the trial court's power to grant a new trial established

by the court below, we have the rule long ago laid down by the English courts which has been followed by the Fourth Circuit. An admirable analysis of it is found in Judge Parker's opinion in *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F. 2d, 350 (1941). He there quotes from Justice Mitchell of the Pennsylvania Supreme Court in *Smith* v. *Times Pub., etc.*, 178 Pa. 481, 36 296 (1897):

> "The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice,—a power exercised in pursuance of a sound judicial discretion, without which the jury system would be a capricious and intolerable tyranny, which no people could long endure. This court has had occasion more than once recently to say that it was a power the courts ought to exercise unflinchingly."

and from Mr. Justice Williams' opinion in the same case:

> "'Trial by jury' therefore meant, at the time of Magna Charta, the investigation and decision of an issue of fact between parties litigant by 12 men, sitting as jurors, under the advice and legal direction of a law judge. When the verdict is rendered by the jury, it is to the court of which they are a part. It is recorded upon the minutes of the court, and becomes a part of the record of the trial; but it does not thereby become a judgment of the court, unless the judge is satisfied with it, and specially or by general order or rule so directs. He has a responsibility for the result no less than the jury, for it is his duty to see that right and justice are done, so far as this may be practicable in the particular case.

If he is not satisfied with the verdict, it is his duty to set it aside, and grant a new trial before another jury. This was the settled practice in England as early as 1665. Forsyth, Jury Tr. 164. Lord Holt states that the practice of granting new trials, as a means of correcting the mistakes and relieving against the misconduct of juries, was in use much earlier than 1665, but accounts for its exercise not appearing in the books for the reason that, prior to that date, the action of the courts upon motions was not reported.

* * * * * *

"As early, therefore, as 1665, the courts at Westminster did precisely what we have done in this case, and for the same reason. The right of trial by jury was not then supposed to give to a successful party the right to insist on an advantage due to the mistake or the willful misconduct of the jury, no matter how grossly unjust and oppressive the result might be; but the supervisory control of the court in banc, sitting as a court of review, was promptly exercised to relieve against the miscarriage of justice. The exercise of this power was then thought to be in aid of trial by jury. Lord Mansfield, in Bright *v.* Eynon, 1 Burrows, 390, described the effect of thus granting a new trial as 'no more than having the cause more deliberately considered by another jury, when there is reasonable doubt, or perhaps a certainty, that justice has not been done.' The function of the jury was well defined by Chief Justice Holt in Ash *v.* Ash, Holt, 701, nearly 100 years before the Declaration of Independence: 'The jury are to try the cause with the assistance of the judge.' They are not, and have never been, independent of the court of which they are a part, but their verdicts must meet the approval, or at least they must not offend the sense of justice, of the presiding judge, who, as the late Justice Grier, of the supreme court of the United States, was

> fond of saying, was by virtue of his position 'the thirteenth juror.'"

and also from Lord Mansfield in *Bright* v. *Eynon*, 1 Burr. 390 (1757):

> "Trials by jury in civil causes, could not subsist now without a power, somewhere, to grant new trials. * * * There are numberless causes of false verdicts, without corruption or bad intention of the jurors. They may have heard too much of the matter before the trial; and imbibed prejudices without knowing it. The cause may be intricate: the examination may be so long as to distract and confound their attention. Most general verdicts include legal consequences as well as propositions of fact: in drawing these consequences the jury may mistake, and infer directly contrary to law. The parties may be surprised by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. If unjust verdicts obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property, in this method of trial, would be very precarious and unsatisfactory. It is absolutely necessary to justice, that there should, upon many occasions be opportunities of reconsidering the cause by a new trial."

The Third Circuit, after classifying and sub-classifying the grounds upon which new trials may be granted, finally arrives at the conclusion that where the litigation deals with material which is familiar and simple, it is not necessary for the trial judge to scrutinize the evidence as closely as he otherwise would. In this situation, according to their view the Judge commits an abuse of discretion if he substitutes his judgment on the veracity of the witnesses for that of the jury.

Applying the theory of the Third Circuit to a "simple" automobile case where the defendant's car, going at excessive speed, mounts a sidewalk and strikes the plaintiff, if a jury in such a situation should render a verdict for the defendant the trial judge would have no power to disturb its findings.

Thus, the issue is clearly posed. Is the trial judge to be restricted by artificial rules which limit and hamper the exercise of his discretion as the Third Circuit would have it; or is he to continue to fulfill his office as he has down through the centuries, bringing to bear the wisdom and experience gained upon the bench as a check on the jury which may be misled or confused and retaining full discretion to submit the case to a new tribunal when in his sound judgment such a course is required?

Respectfully submitted,

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